1956

Viola Vogle Wilson v. Marcel Felix Wilson : Brief of Respondent

Utah Supreme Court

Lamar Duncaon; Adam M. Duncan; Attorneys for Respondent;

Case No. 8434

In The Supreme Court
of the State of Utah

VIOLA FOGLE WILSON,
Plaintiff and Respondent,

— v. —

MARCEL FELIX WILSON,
Defendant and Appellant,

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

On March 21, 1955, plaintiff filed an action for divorce on the ground of mental cruelty, after having been married to defendant ever since the 10th day of March, 1940. Thereupon and in due time defendant filed his answer and counterclaim also alleging mental cruelty as a ground for divorce. Plaintiff replied to the counter claim and after obtaining leave of Court filed an amended complaint alleging specific acts of cruelty. The plaintiff served defendant with written interrogatories which, inter alia, asked defendant what conduct on her part had destroyed any love and affection between the parties as

charged in defendant's answer to plaintiff's amended complaint. (R.14) Defendant answered the question in substance by stating plaintiff has procured an abortion and had refused to have any children.

This case was tried in Farmington, September 15, 1955, before the Hon. John F. Wahlquist, Judge of the Second Judicial District.

The evidence showed that for fifteen years plaintiff and defendant lived happily together without any serious trouble; that they never separated (Tr.15); that from time to time defendant sent little remembrances and love notes to plaintiff until shortly before the 13th day of March, 1955; On or about the 13th day of March, 1955, plaintiff and defendant had been out to dinner with friends (Tr.4); that defendant was unable to sleep and plaintiff, upon inquiring was told by defendant that he had fallen in love with one Phyllis Moll and that he wanted a divorce in order that he might marry Mrs. Moll. This latter testimony was corroborated by defendant himself when on cross examination he stated that he anticipated marrying Mrs. Moll (Tr.51), that Mrs. Moll had obtained a divorce on March 22nd, 1955 (Tr.52), and that she was living in the rental unit of defendant's home and that defendant was keeping her. (Tr.53)

The evidence further showed that plaintiff had gone to the doctor concerning the fact that they had not had children; that she had had a tubular pregnancy which required an emergency operation and thereafter there were no children, although she had not avoided having children (Tr.34); that she in fact wanted a family. Plaintiff and defendant testified that during the fifteen years of their marriage plaintiff and defendant had var-

ious degrees of financial success and that defendant had earned from $80.00 per month up to the time of the divorce when he left his employment as a hair stylist to sell real estate; that in the short time before the divorce he earned approximately $300.00. The Court found defendant capable of earning $250.00 to $300.00 per month (Tr.55—Findings).

On the other hand plaintiff testified that she was in poor health and incapable of working (Tr.11); that she is forty five years of age and knows no profession or occupation with which to maintain herself.

The Court awarded to plaintiff judgment in the sum of $5,000.00 payable at the rate of $50.00 per month without interest, in lieu of alimony, stating that "said sum is intended as a portion of the allocation of property to the plaintiff and shall be a charge upon the estate of defendant as to any balance that should remain should he die prior to the full payment thereof." (Tr.33)

In addition the Court awarded to plaintiff both pieces of real property, together with the furniture therein, subject to any encumbrances existing.

The moneys of the parties were accounted for, plaintiff showing that she lived on the bank account from the time of the separation until the time of the decree without ~~plaintiff~~ defendant who was then courting Mrs. Moll, paying her anything. The money from uranium stock was turned over to defendant's counsel after deducting from said amount plaintiff's counsel fees.

STATEMENT OF POINTS

Under the smog of verbosity appellant alleges but one point on appeal:

DID THE TRIAL COURT ABUSE ITS DISCRETION IN MAKING ITS PROPERTY AWARD TO RESPONDENT.

ARGUMENT

This Court early decided in *Reed vs. Reed,* 28 Utah 297, 78 P. 675. (1904) that:

> "The awarding of alimony and fixing the amount thereof are questions the determination of which rests within the sound discretion of the trial court; and, ***unless it is made to appear that there has been an abuse of discretion on the part of the Court in dealing with one or both of these questions, its judgment and orders granting and fixing the alimony will not be disturbed.*** In determining these questions the amount of property owned by the husband, his capabilities and opportunities for earning money, the health of each, and their respective ages, the station in life in which the wife has been accustomed to live, and the amount and kind of her own property, will be taken into consideration by the Court." (Emphasis added.)

In the case of *Blair v. Blair*, 40 Utah 306, 121 P.19 (1912), this doctrine was reaffirmed. Again, in *Adamson v. Adamson* 55 Utah 544, 188 P. 635 (1920), the Court held, "the granting or withholding of alimony in divorce proceeding is a matter within the sound discretion of the Court."

In *Pinney v. Pinney,* 66 Utah 612, 245 P. 329 (1926) the Court also held: "The division of property in a matter that rests largely within the sound discretion of the trial Court. Unless it appears from the finding that the division made is not equitable under all the circumstances of the case, an appellate Court could not and will not disturb the order of the trial Court."

In the case at bar the only issue is therefore whether or not the trial Court did or did not abuse its discretion in awarding the property to plaintiff in the manner in which it did.

In deciding this matter of the division of the property the Court gave it very careful consideration and made the ruling in view of all the circumstances. (See page 57 of transcript.)

No permanent award of alimony was made so that defendant, who is an able-bodied man — when he wants to be — will be able to take his new bride without the burden of maintaining his old one. Thus he can in one hundred convenient monthly installments completely shed the responsibility created by a marriage of fifteen successful and happy years and acquire a new wife in much the same fashion as he might shed his old clothes for newer ones.

It was established that plaintiff had never worked, but had devoted her entire time and efforts to making a home for defendant. Defendant, on the other hand, consistent with his proven lack of character, desires to participate in the properties without being required to support plaintiff at all.

There can be no argument that plaintiff was and is blameless for what occurred and normally defendant would find

himself under the obligation of permanent alimony. In this case, however, defendant is not satisfied with merely taking fifteen years of this plaintiff's life, but now claims he should avoid alimony, which he did and in addition have what property the parties have received during their marriage. This indeed would be a classic illustration of the wandering male's being able to successfully eat his cake and have it too.

We should like to call the Court's attention to this division of the property which defendant claims was such an abuse of the trial Court's discretion. Plaintiff received the small home on 3rd West Street in Salt Lake City, purchased originally for not more than $2700.00 (Tr.14) which even on today's inflated market, is worth very little either as commercial property or as a desirable homesite. The home in Bountiful was awarded to plaintiff *subject to a mortgage in the sum of $9,352.74 which plaintiff must assume.* (Tr.10.) The furniture in the home had very little resale value. In addition plaintiff will be required to pay taxes and upkeep on these properties with defendant only paying $50.00 per month for the next eight years. This is not subject to any modification by the Court as indicated by the decree.

Plaintiff also received the balance of the bank account which was practically spent by plaintiff to maintain herself from the time defendant left home to seek his new matrimonial pursuit until the time of trial. During that time he paid plaintiff no alimony at all and now wants a division of that money on which plaintiff maintained herself for about seven months. As to the stocks and the check for them, plaintiff kept this intact and the Court ordered the defendant to endorse it and plaintiff to cash the same and return the balance to defendant. (Tr.59).

Therefore, we submit that the statement of appellant in his brief that plaintiff received $20,000.00 in property, is wholly misleading and untrue.

Inasmuch as Counsel has chosen to submit considerable material dehors the trial Court record, (e. g. "defendant understands plaintiff is working at the present . . ." App. Brief p. 11 — which statement is wholly untrue —) the foregoing statement of fact, taken entirely from the record, is submitted. Such extraneous and prejudcicial materials submitted by appellant are, of course, to be accorded no probative value by the Appellate Court.

We call this Honorable Court's attention to the fact that plaintiff has received nothing from defendant since the entry of this decree; that in addition thereto she has been required to engage counsel to respond to defendant's appeal and to represent her in this Court. Under the provisions of Sec. 30-3-3 U.C.A. (1953) plaintiff should be allowed a reasonable sum with which to pay her counsel for his appearance in this Court. It is submitted that $300.00 is a reasonable sum to be allowed plaintiff for the use and benefit of her counsel herein. *(Dahlberg v. Dahlberg* 77 Utah 157, 292 P.214 (1930).

CONCLUSION

We submit that nowhere in the record does it appear that defendant and appelant was unfairly treated, or that there was any abuse of the discretionary power of the trial Court in its division of the property. Defendant and appellant has seen fit to break up this marriage with no apparent reason whatsoever other than his infatuation with another man's wife. Ap-

pellant's suggestion that the properties the parties had acquired were his own to be taken to his new wife and the interests of his old wife disregarded are so unconscionable as to be undeserving of comment. The trial Judge very carefully considered this matter and we invite this Honorable Court to examine his statement from the bench in reaching his ruling (Tr.57).

In conclusion, Respondent urges this Court affirm the decree of the lower Court and award to plaintiff and Respondent herein, her costs and a reasonable attorney's fee for the use and benefit of her counsel. (It is suggested that $300.00 is a reasonable sum to be so allowed.)

Respectfully Submitted,
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